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Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal

*Theodore Eisenberg and Trevor W. Morrison**

Disputes over forum often center on whether a case should proceed in state or federal court. Removal to federal court can trigger a costly forum struggle. When a state case is removed to federal court only to be sent back to state court, the time and resources incurred in the detour are a toll on the judicial system and waste parties' resources. We find erroneous removal to be an increasing problem. From 1993 to 2002, a period when state tort filings noticeably decreased, the number of removed diversity tort cases increased by about 10 percent to about 8,900 per year. By 2003, removed cases comprised over 30 percent of the federal diversity docket. The percentage of removals ultimately remanded to state court increased significantly to about 20 percent in 2003, with the remand rate exceeding 50 percent in some districts. Thus, as more cases purporting to satisfy diversity jurisdiction were being removed to federal court, and just as removals were occupying an increasing part of the federal docket, removed cases were being remanded to state court at increasing rates. Erroneous removal is a growing phenomenon that should be addressed as part of serious consideration of tort reform.

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I. INTRODUCTION

Disputes over forum are a staple of civil litigation, often centering on whether the case should proceed in state or federal court.¹ The pattern is familiar: plaintiff sues in state court; defendant removes to federal court, contending the case meets the requirements of federal jurisdiction; plaintiff counters by seeking a remand to state court, arguing removal was improper. These skirmishes matter. First, a party tends to fare better when the case is litigated in its chosen forum. Thus, when a defendant removes a state case to federal court, it obtains an advantage.² Even if the case is never fully tried, the terms of the settlement will likely reflect the results of the forum contest.³ Second, removal disputes can be expensive, in terms of both time and money. Litigating a removal may run up attorney fees and other costs, thus sapping the poorer party's litigation resources and harming its bargaining position. In short, removal can have powerful effects.⁴

¹See J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 *Wayne L. Rev.* 317, 333 (1967) ("forum-shopping, among both federal and state courts, is a national legal pastime").

²"Statistical analysis indicates a removal effect for diversity cases in the neighborhood of a reduction from even (or 50%) odds for plaintiffs to about 35%. A further regression controlling for the case-selection theory of locale aversion, however, raises plaintiffs' odds to 39%." Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything about the Legal System? Win Rates and Removal Jurisdiction*, 83 *Cornell L. Rev.* 581, 606–07 (1998). Stated otherwise, "plaintiffs' loss of forum advantage . . . reduces their chance of winning by about one-fifth." *Id.* at 607 n.81; see also Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 *Cornell L. Rev.* 119, 123 (2002) ("forum really does affect outcome, with removal taking the defendant to a much more favorable forum").

³See Clermont & Eisenberg, *Win Rates*, *supra* note 2, at 599 ("After removal . . . the parties will settle or litigate subject to the real or perceived differences of the federal forum.").

⁴These effects have long been evident. For example, in the first decades of the 20th century, when the federal courts were widely viewed as hostile to suits by relatively poor individuals against large corporate entities, defendants "cherished and valued" their right of removal and exercised it regularly. Armistead M. Dobie, *Handbook of Federal Jurisdiction and Procedure* 364 (1928); see C.P. Connolly, *Big Business and the Bench: The Federal Courts—Last Refuge of the "Interests,"* 26 *Everybody's Mag.* 827 (1912); see also Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in *Civil Procedure Stories* 22, 27 (Kevin M. Clermont ed., 2004) (quoting a federal judge as remarking in 1930 that "nearly all of the personal injury cases were removed to the federal court on account of diversity of citizenship by the mining, smelting, railroad, and other large corporations doing business' in the state") (quoting William H. Sawtelle to George W. Norris, June 7, 1930, George W. Norris Papers (Library of Congress), "Limiting Jurisdiction of Federal Courts, 1929–30, file,"

This power may give reason to be especially concerned about the risk of erroneous removal. The removal process enables a defendant to remove a state case to federal court automatically, without any initial adjudication of whether the requirements for removal are met.⁵ Erroneous removals can be cured only after the fact, when the plaintiff seeks a remand or the federal court orders it sua sponte. Even then, a remand order does not fully cure the error, as by itself it cannot recapture the time and resources lost in the process.⁶ Given this, there is reason to worry not only about the possibility of good-faith mistakes in the removal process, but knowing abuse as well. A defendant hoping to squeeze resources from its less-well-financed opponent might remove a case, even though it knows the requirements for removal are not met, simply to impose on the plaintiff the costs of litigating the remand.⁷

Erroneous removal is costly for the courts as well as the parties. When a state case is removed to federal court only to be sent back to state court, the time and resources incurred in the detour are a toll on the judicial system. Federal court resources are expended on a case that should not have been there, and the parties ultimately return to state court having made no progress toward resolving the merits of their case. This is “essentially a waste of time and resources,” for the courts as well as the parties.⁸

Tray 78, Box. 8); Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958*, at 20–22 (1992) (providing data to confirm the prevalence of removal by corporate defendants in the late 1920s and early 1930s).

⁵See text accompanying notes 32–37 for a discussion of the mechanics of removal and remand.

⁶We discuss the availability of fee-shifting below. See notes 63–65 and accompanying text.

⁷Such maneuvering is nothing new. As Edward Purcell has explained, in the early 20th century, out-of-state corporate defendants sued in state court by in-state plaintiffs exercised their right to remove in part because of the tactical advantage it conferred:

Because federal suits were more inconvenient and expensive, and because those burdens weighed much more heavily on parties with few resources, removal often placed heavy and disproportionate pressures on relatively poor individual plaintiffs. Consequently, corporations were often able to use removal to exploit those practical burdens and thereby induce individual plaintiffs to abandon their claims or settle them for minimal amounts.

Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* 66 (2000).

⁸*Navarro Savings Ass’n v. Lee*, 446 U.S. 458, 464 n.1 (1980) (quoting David P. Currie, *The Federal Courts and the American Law Institute*, Part I, 36 U. Chi. L. Rev. 1, 1 (1968)); see *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas,

Despite these costs, the public debate over “tort reform” largely ignores the issue of erroneous removal. Instead, the debate typically focuses on perceived abuses by the plaintiffs’ bar.⁹ Consider, for example, the Class Action Fairness Act of 2005.¹⁰ Designed principally to counter the attempts of plaintiffs’ counsel to structure state class-action lawsuits so as to keep them in state court,¹¹ the statute creates a number of new grounds for removing such suits to federal court.¹² The law does not, however, address the problem of erroneous—even knowingly erroneous—removal. This is not because the drafters of the law were unaware of the problem. To the contrary, the Senate Committee Report on the bill openly notes the existence of erroneous removal.

Under the current standards [prior to the enactment of the new statute], many (and possibly most) newly-filed state court class actions are removed to federal court to test whether the class counsel’s efforts to evade federal jurisdiction have been successful (*even though those removal attempts normally fail and the cases are remanded to state court*). Those inquiries are often quite complicated and can create significant delays.¹³

J., concurring in the judgment) (advocating the adoption of “clear, bright-line [jurisdictional] rule[s]” so that “judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction”).

⁹See, e.g., John H. Beisner, Matthew Shors & Jessica Davidson Miller, Class Action “Cops”: Public Servants or Private Entrepreneurs? 57 Stan. L. Rev. 1441, 1444–51 (2005) (claiming that “[t]here is growing public distrust of the class action device,” and focusing on the actions of plaintiffs’ counsel).

¹⁰Pub. L. 109–2, 119 Stat. 4 (2005).

¹¹Id. at § 2(a)(4), 119 Stat. 5 (finding that “[a]buses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction . . . , in that State and local courts are . . . keeping cases of national importance out of Federal court,” and stating that one of the purposes of the Class Action Fairness Act is to “provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction”); S. Rep. No. 109–14, at 68 (2005) (stating that “current law enables lawyers to ‘game’ the procedural rules and keep nationwide or multi-state class actions in state courts,” and further stating that the Class Action Fairness Act “makes it harder for plaintiffs’ counsel to ‘game the system’ by trying to defeat diversity jurisdiction” and “places the determination of more interstate class action lawsuits in the proper forum—the federal courts”).

¹²See, e.g., id. at § 4(a) (expanding federal diversity jurisdiction over class actions where the matter in controversy exceeds \$5 million) and § 5(a) (providing for removal of class actions meeting the new jurisdictional requirements).

¹³S. Rep. No. 109–14, at 68 (2005) (emphasis added).

Despite this rather striking acknowledgment, however, the statute does nothing to address the problem head on, and instead simply expands the grounds of permissible removal. Yet even as the legislation creates new grounds for removal, it presents new ways for removal to happen in error.¹⁴ At some point, therefore, the issue of erroneous removal may demand more direct treatment.

One reason for the lack of such treatment to date may be the absence of any clear sense of the extent of the problem.¹⁵ Although the supporters of the Class Action Fairness Act acknowledged the general prevalence of

¹⁴For example, the law provides that federal district courts “may” decline to exercise jurisdiction over certain class actions, and “shall” decline to exercise jurisdiction over others, based on such matters as the percentage of the plaintiff class that consists of citizens of the state where the action was originally filed, the significance of an in-state defendant’s role in the case and of the relief sought against that defendant, and the location of the “principal injuries” alleged to have been caused by each defendant. See Pub. L. 109–2, § 4(a), 119 Stat. 10. In the face of such complicated provisions, it is easy to imagine erroneous removals flourishing. At the very least, it seems certain that these new numerical requirements will spur new, potentially time-consuming litigation over whether they are satisfied in any given case. See Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 *Stan. L. Rev.* 1521, 1543 (2005) (“One concern with using any numerical test is that it creates the potential for satellite litigation over whether the tests have been met.”). To the extent a defendant removes a case in part just to delay the case and increase the plaintiffs’ litigation bill, the prospect of such litigation provides an added incentive to engage in erroneous removal.

There is also another way the new law may increase the incentive for erroneous removal. Previously, remand orders in most cases were unappealable. See 28 U.S.C. § 1447(d). But see Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 *Mo. L. Rev.* 287 (1993) (contending that, in the wake of the Supreme Court’s 1976 decision in *Thermtron Prods., Inc., v. Hermansdorfer*, federal appellate courts have gradually eviscerated §1447(d)’s bar on appellate review of remands). The Class Action Fairness Act changes that for class-action cases removed pursuant to its provisions. See Pub. L. No. 109–2, § 5(a), 119 Stat. 12 (providing that “a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order”). Courts of appeals are directed to resolve such appeals within 60 days, though they are also authorized to extend that period. *Id.* By making remand orders appealable, the Class Action Fairness Act provides defendants with another way to obtain tactical advantage by imposing delays on their opponents.

¹⁵See Morrison, *supra* note 14, at 1542 (noting “the lack of evidence generally on th[e] topic” of “illegitimate removals”). There is some evidence in the existing literature, but not much. See Clermont & Eisenberg, *Litigation Realities*, *supra* note 2, at 121–23 (presenting evidence showing that the percentage of federal diversity cases originating as removals has increased substantially over the past two decades, and that the remand rate of such removals has also increased substantially over that same period).

erroneous removal,¹⁶ systematic empirical analysis is lacking. This study seeks to fill the void. We rely principally on data gathered by the Administrative Office of the U.S. Courts, assembled by the Federal Judicial Center, and disseminated by the Inter-University Consortium for Political and Social Research (the AO data).¹⁷ These data include information about every case terminated in federal district court from 1979 through September 30, 2003. The AO data allow us to track the total number of state cases removed to federal court each year, the proportion of the federal district courts' docket that consists of removal cases, and the rate at which removed cases are remanded to state court. The data also identify cases by source of federal jurisdiction (e.g., diversity, federal question, and federal defendant) and area of law (e.g., contract, tort), allowing us to trace removal and remand patterns within those categories.

Our results reveal certain trends in removal and remand. The trends are particularly salient in federal diversity cases.¹⁸ First, the annual number of cases removed to federal court on the basis of diversity generally increased between 1979 and 2002. In addition, the proportion of the federal diversity docket that originated in federal court by way of removal rose steadily from 1979 to 2003. Finally, the percentage of removals ultimately remanded to state court increased significantly over this same time period. That is, just as more cases purporting to satisfy diversity jurisdiction were being removed to federal court, and just as removals were occupying an ever-larger part of the federal docket, more removed cases were being remanded to state court. In short, erroneous removal is a growing phenomenon.

The balance of this article proceeds in four parts. We begin Section II by briefly summarizing the purposes and procedures of removal. In so doing, we identify the features of removal practice that create opportunities for

¹⁶See text accompanying note 13.

¹⁷See Inter-University Consortium for Political & Social Research, Federal Court Cases: Integrated Data Base, 2003, ICPSR Study No. 4026 (2004); Inter-University Consortium for Political & Social Research, Federal Court Cases: Integrated Data Base, 2002, ICPSR Study No. 4059 (2004); Inter-University Consortium for Political & Social Research, Federal Court Cases: Integrated Data Base, 2001, ICPSR Study No. 3415 (2002); Inter-University Consortium for Political & Social Research, Federal Court Cases: Integrated Data Base, 1970–2000, ICPSR Study No. 8429 (2001). For a discussion of the reliability of this database, see Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 Notre Dame L. Rev. 1455 (2003).

¹⁸See text accompanying notes 23–26 for a brief discussion of diversity jurisdiction.

abuse. To put those theoretical opportunities in a more concrete context, we offer anecdotal evidence of clearly erroneous removal.

In Section III, we present our findings, drawn from the AO data, regarding national trends in removal and remand between 1979 and 2003. As suggested above, our findings suggest that erroneous removal is a growing phenomenon, and hence an increasingly burdensome deadweight loss for the federal judicial system.

In Section IV, we look more closely at removal and remand in one individual state, Alabama. The trends at the national level are repeated in Alabama, but in more extreme form. Moreover, our examination of the docket sheets for one year's worth of removal-origin diversity cases in two federal districts in Alabama enables us to track information not included in the AO data, including whether a particular removal was ever challenged by way of a remand motion. That information, in turn, allows us to compare plaintiffs' success with remands to defendants' success with removals. Section V provides some concluding thoughts.

II. THE PROCESS OF REMOVAL AND OPPORTUNITIES FOR ABUSE

Grappling with the problem of erroneous removal requires attention to the rules governing removal. We therefore begin this section with an overview of those rules. We then discuss ways the removal process creates opportunities for abuse. To confirm that those opportunities are not merely hypothetical, we also identify a few actual examples of abusive removal.

A. *The Removal Process*

Ever since the Judiciary Act of 1789,¹⁹ Congress has authorized defendants to remove certain state cases to federal court. From 1789 to 1887, the requirements for removal were independent of the requirements for initiating a case in federal court as an original matter.²⁰ In the Judiciary Act of

¹⁹See Judiciary Act of 1789, 1 Stat. 73.

²⁰*Id.*, § 12, 1 Stat. at 79–80 (permitting removal only in cases where the amount in controversy exceeded \$500, and even then only if the removing party was (1) a defendant who was an alien; (2) a defendant who was a citizen of another state, being sued by a citizen of the forum state; or (3) either a plaintiff or defendant, where the cases involved conflicting claims of title to land

1887,²¹ however, Congress tied the elements of removal jurisdiction to the elements of original jurisdiction. The current general removal provision, 28 U.S.C. § 1441(a), continues that approach.²² Thus, state cases that could have been initiated in federal court may (assuming adherence to certain procedural rules described below) be removed from state to federal court.

In theory, permitting removal whenever the case could have been filed in federal court helps effectuate the aims of the federal jurisdictional grant itself. Consider diversity jurisdiction. In general, this head of jurisdiction permits cases to be brought in federal court where the matter in controversy exceeds a prescribed jurisdictional minimum²³ and the case is between citizens of different states, citizens of a state and citizens or subjects of a foreign state, or a foreign state as plaintiff and citizens of a domestic state or states.²⁴ For present purposes, the most significant aspect of diversity jurisdiction covers cases between citizens of different states. Although the historical record contains very little direct evidence on this point,²⁵ the prevailing

pursuant to conflicting grants of land by different states, and where the nonremoving party claimed title pursuant to a grant by the forum state). In addition, a number of specific removal statutes enacted during this period authorized removal of certain relatively narrow classes of cases, such as state suits and prosecutions against federal officers. See, e.g., Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198–99; Act of Mar. 3, 1815, ch. 94, § 6, 3 Stat. 231, 233–34, extended for one year by Act of Apr. 27, 1816, ch. 110, § 3, 3 Stat. 315, 315. For further discussion of federal officer removal, see Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 *Yale L.J.* 2195 (2003).

²¹Act of Mar. 3, 1887, 24 Stat. 552, corrected by Act of Aug. 13, 1888, 25 Stat. 433.

²²“Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a).

²³The Judiciary Act of 1789 set the jurisdictional threshold at \$500. See Judiciary Act of 1789, § 11, 1 Stat. 73, 78. Congress has increased the threshold five times since then, and today it stands at \$75,000. 28 U.S.C. § 1332(a); see also Act of May 3, 1887, 24 Stat. 552, 552 (increasing the threshold from \$500 to \$2,000); Act of Mar. 3, 1911, Pub. L. No. 61–475, 36 Stat. 1087, 1091 (\$3,000); Act of July 25, 1958, Pub. L. No. 85–554, 72 Stat. 415 (\$10,000); Pub. L. No. 100–702, 102 Stat. 4642 (1988) (\$50,000).

²⁴28 U.S.C. § 1332(a)(1)–(4).

²⁵See 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3601, at 337 (2d ed. 1984) (“Neither the debates of the Constitutional Convention nor the records of the First Congress shed any substantial light on why diversity jurisdiction was granted to the federal courts by the Constitution or why the First Congress exercised its option to vest that jurisdiction in the federal courts.”).

account since at least the mid-19th century has been that diversity jurisdiction reflects a concern that state courts might unduly favor their own state residents over out-of-state parties.²⁶ Yet if that is the concern, then merely vesting the federal courts with diversity jurisdiction is likely insufficient, for in-state plaintiffs suing out-of-state defendants will simply decline to invoke federal diversity jurisdiction in favor of proceeding in state court.²⁷ Removal responds to that problem by allowing defendants sued in state court to remove the case to federal court to the extent it could have been filed in federal court in the first place.

Removal litigation is not, however, simply a matter of determining whether the case falls within a grant of original federal jurisdiction. In addition to that substantive threshold, Congress has prescribed certain procedural rules.²⁸ Most significantly, defendants generally must file a notice of removal in federal court no more than 30 days after receiving a copy of the plaintiff's state court complaint.²⁹ If the case as originally filed is not removable, the 30-day clock does not begin to run until the defendant receives a copy of an amended complaint or other pleading "from which it may first be ascertained that the case is one which is or has become removable,"

²⁶See *Guaranty Trust Co. v. York*, 326 U.S. 99, 111–12 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias."); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state."); *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1856) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different states, has its foundation in the supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners."). Whether such state court bias actually exists has long been a matter of considerable dispute. See, e.g., Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 *Harv. L. Rev.* 483, 493 (1928) (arguing that "such information as we are able to gather . . . entirely fails to show the existence of prejudice on the part of the state judges").

²⁷As a general matter, of course, there is nothing improper about a plaintiff making such a choice. The federal and state courts generally have concurrent jurisdiction of cases meeting federal diversity requirements, and it is perfectly permissible for a plaintiff to select the state forum.

²⁸We note, moreover, that determining compliance with even the substantive requirements may be no simple matter, at least in certain classes of cases. See note 14 (discussing the Class Action Fairness Act's expansion of federal diversity jurisdiction over certain class-action suits, and noting that the new jurisdiction depends in part on satisfaction of a number of rather complicated requirements).

²⁹See 28 U.S.C. § 1446(b).

except that a case may not be removed on the basis of diversity jurisdiction more than one year after the action was first commenced.³⁰ Difficult questions can arise under these provisions, especially concerning when the 30-day clock should run. For example, in states that do not require (or even permit) plaintiffs to demand a specific sum in their complaints, at what point does it become sufficiently clear that the amount in controversy satisfies the jurisdictional minimum under the diversity statute? Courts have not arrived at a uniform answer.³¹ Thus, as an initial matter we should perhaps be unsurprised to see a certain amount of erroneous removal. Desiring to remove a case to the extent possible, but unable to determine for certain whether the 30-day window is still open, defendants may in all good faith decide to err on the side of removal.

B. Defendants' Unilateral Control of Removal

Critically, defendants can decide to err on the side of removal because they wield exclusive authority over the removal decision. Neither the plaintiff nor the state court where the case was originally filed plays any role in determining whether the case is suitable for removal. Instead, the defendant simply files a notice of removal in the federal district court covering the territory where the state case is pending.³² Removal is automatic on filing of the notice. If the propriety of the removal is litigated at all, it happens *ex post* in federal court, either on the plaintiff's motion to remand³³ or on the district court's own initiative.

³⁰*Id.* The Class Action Fairness Act, discussed in the text accompanying notes 10–14, provides that class actions removed pursuant to the Act are not subject to the one-year limitation. See Pub. L. 109–2, § 5(a), 119 Stat. 12.

³¹See Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1544–45 (5th ed. 2003) (discussing this and related questions, and citing cases adopting different approaches); 14C Wright, Miller & Cooper, *supra* note 25, § 3725.

³²See 28 U.S.C. § 1446(a).

³³See 28 U.S.C. § 1447(c). Remand motions are also subject to certain timing constraints. Although a remand for lack of subject matter jurisdiction may be sought and granted at any time, a motion to remand on other grounds (e.g., the defendant's failure to remove within the prescribed 30 days) must itself be made within 30 days of the filing of the notice of removal. *Id.*

This lack of an ex-ante constraint on removal would seem to invite erroneous, and perhaps even knowingly erroneous, removal. Whether the error reflects an honest miscalculation of such things as the 30-day removal window or a knowing effort to seek the litigation advantages that come with delaying the state court proceedings, the only front-end protection against erroneous removal is the defendant's own judgment. To be sure, there are devices in place to discourage obvious abuse: defense counsel must sign the notice of removal pursuant to Rule 11 of the Federal Rules of Civil Procedure,³⁴ and an order remanding a case may, in the district court's discretion, require the defendant to pay the plaintiff's attorney fees and costs incurred as a result of the removal.³⁵ But such sanctions are not always applied in a consistent fashion. This is especially true of attorney fees, though, as noted below,³⁶ a case currently pending before the Supreme Court may provide an opportunity to clarify the applicable standard.³⁷ At present, however, the structure of removal makes the process vulnerable to error.

C. Examples of Removal Abuse

Anecdotal evidence of erroneous removal is readily available. Such evidence suggests that abusive removal—that is, *knowingly* wrongful removal—may well be a problem. If we were to develop a typology of removal abuse on the basis of this evidence, we might begin with *multiple wrongful removal*. In *Smith v. Life Insurance Co. of Georgia*,³⁸ for example, the defendant removed the case to federal court four times over the course of two years. Each time, the district court returned the case to state court. The district court expressed evident frustration with the defendant's actions, especially considering that the fourth removal happened after trial had already begun in state court.³⁹ Even though the fourth removal was improper, it had the effect of derailing

³⁴28 U.S.C. § 1446(a).

³⁵28 U.S.C. § 1447(c).

³⁶See note 61.

³⁷See *Martin v. Franklin Capital Corp.*, *petition for cert. granted*, 125 S. Ct. 1941 (Apr. 25, 2005) (No. 04-1140).

³⁸No. 4:04CV97 (N.D. Miss.).

³⁹See Memorandum Opinion, No. 4:04CV97 (N.D. Miss., May 28, 2004).

the state trial, ultimately obliging the state court to release the original jury venire and requiring plaintiffs to start again with a later trial date.

We might also include in our typology of wrongful removal the phenomenon of *nonparty removal*. In *Aluminum Co. of America v. Admiral Insurance Co.*,⁴⁰ for example, an entity not a party to the case filed a notice of removal. The entity, an insurance company, presumably saw some advantage in removing a state case against a similarly situated insurance company. Yet removal by a nondefendant is—and was at the time—clearly improper.⁴¹ Accordingly, the district court remanded the case. Moreover, any doubt about whether this tactic was the product of an honest mistake seems dispelled by *Ieyoub v. American Tobacco Co.*,⁴² where the very same insurance company again removed the case despite the fact that it was again not named as a defendant. It is hard to understand erroneous removals like these as anything other than knowing abuses of the litigation process in order to secure procedural advantage.

Of course, isolated anecdotes of removal abuse do not provide a reliable nationwide picture. Too often, the tort reform debate is driven by a few stories of outlandish litigation abuse, as though that is enough to justify reform. It isn't. Thus, we turn in the next section to a discussion of the empirical data on removal and remand.

III. NATIONAL TRENDS: THE GROWTH OF ERRONEOUS REMOVAL

In this section we discuss findings based principally on the AO data. With respect to diversity cases in particular, we find a number of trends: the annual number of diversity-based removals has generally increased over the last two decades; the proportion of the federal diversity docket consisting of cases originating as removals has also increased; and the rate at which removed diversity cases are remanded has risen as well. Taken together, these trends suggest that erroneous removal is a growing phenomenon, and thus exacts a growing toll on the federal judiciary.

⁴⁰No. C93-32C (W.D. Wash.).

⁴¹See, e.g., *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 578-79 (1954).

⁴²No. 97-1174 (W.D. La.).

To apprehend nationwide patterns of removal and remand, we must look at several different trends. *First*, we need a background understanding of litigation rates in the state courts. The vast majority of civil lawsuits in this country are initiated in state, not federal, court.⁴³ Over the past decade, however, certain kinds of state court litigation have decreased. The National Center for State Courts has found that, across 35 states representing about 77 percent of the national population, tort filings decreased by 4 percent between 1993 and 2002.⁴⁴ In short, tort filings—which are the focus of tort reform efforts, and as we shall show, are central to the story of erroneous removal—are down in the state courts.

Second, and bearing in mind the overall decrease in state tort filings, we turn to changes in the annual number of removals from state to federal court. The AO data reveal that, over roughly the same period, diversity-based tort removals did not decline. In 1993, 8,128 removed diversity tort cases terminated in federal court. By 2002, the last full year for which numbers are publicly available, the number had increased to 8,926, an increase of about 10 percent.⁴⁵ In short, a shrinking pool of state tort cases did not yield a similarly shrinking number of tort removals. Instead, defendants removed about the same number of diversity tort cases despite a shrinking pool from which to draw.

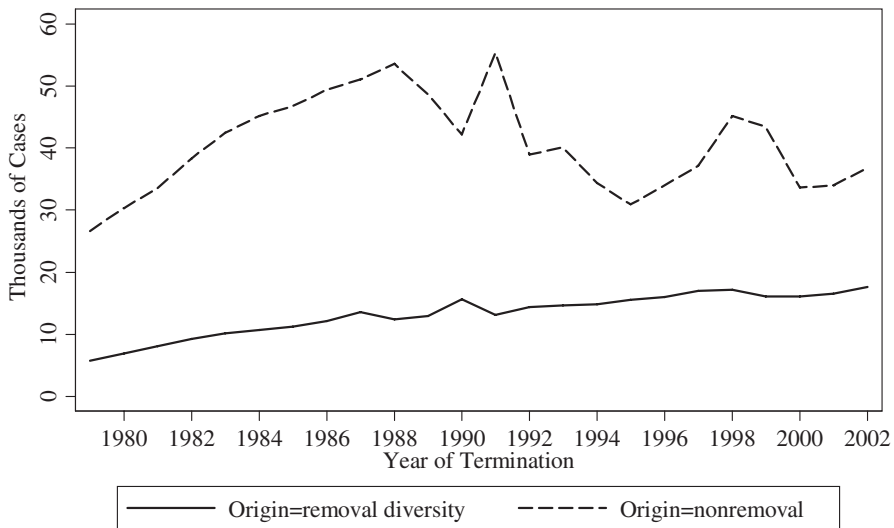
Moreover, if we look at all diversity removals over the same period (expanding the search beyond just tort cases), we again see an increase in the number of removals per year. In 1993, 14,637 removed diversity cases terminated in federal court; in 2002, that number rose to 17,622. Longer-term trends are consistent. As Figure 1 shows, from 1979 to 2002 the total annual number of diversity cases originating as removals generally increased. The same is not true, however, of diversity cases initiated in federal court over the same time period. Indeed, whereas the volume of diversity litigation originating in federal court fluctuated considerably between 1979 and 2002 (returning in 2002 roughly to 1979 levels), diversity removals rose fairly steadily over the same period.

⁴³See Daniel John Meador, *American Courts* 31–33 (2d ed. 2000).

⁴⁴See National Center for State Courts, *Examining the Work of State Courts, 2003: A National Perspective from the Court Statistics Project* 23 (2004).

⁴⁵In 1997 and 1998, diversity tort removals exceeded 9,400. In 1999, 2000, and 2001, they ranged between 8,000 and 8,100.

Figure 1: Federal diversity cases first filed in federal court versus federal diversity cases originating as removals.

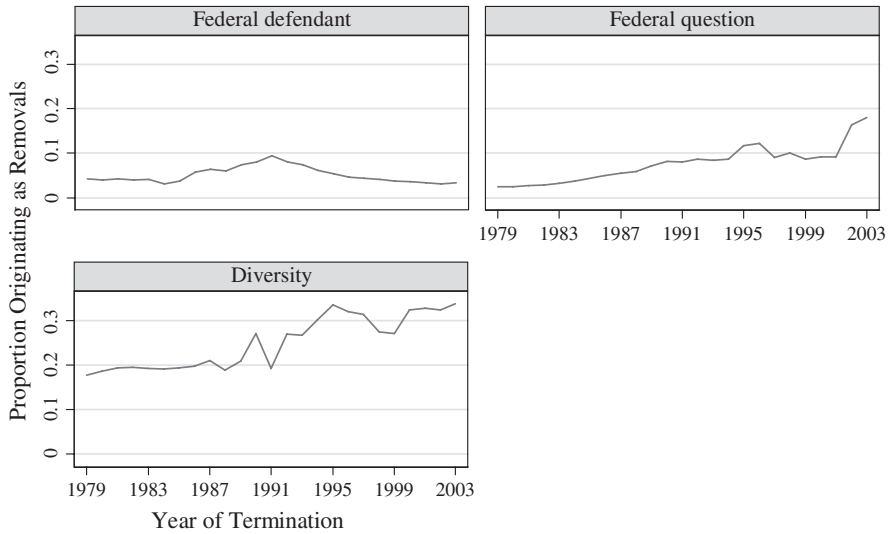


SOURCE: Administrative Office of the U.S. Courts, 1979–2002.

Third, we consider removals in relation to the federal courts' overall caseload. Here again, diversity removals in particular display an upward trend. As Figure 2 demonstrates, between 1979 and 2003 there was a significant increase in the proportion of federal diversity cases originating as removals. Removed cases accounted for less than 20 percent of the diversity docket in 1979; by 2003, the figure well exceeded 30 percent. The same trend is visible when, as in Figure 3, we divide diversity cases by substantive case category: diversity-based tort removals account for an increasing proportion of the diversity tort docket; diversity-based contract removals account for a similarly increasing proportion of the diversity contract docket.

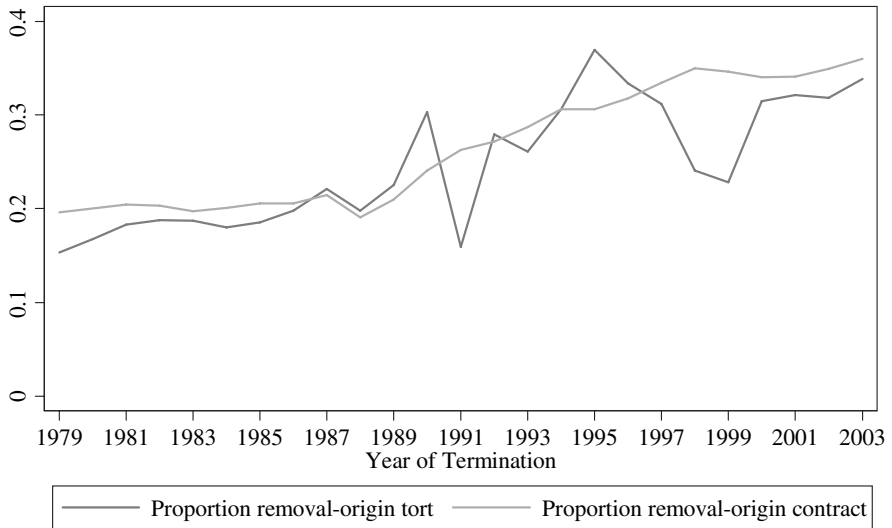
Fourth, and most importantly, we consider changes in the rate at which removed cases were remanded to state court. Once again, the data reveal a clear trend in diversity cases. As Figure 4 shows, removed diversity cases' increased presence on the federal docket was accompanied by a substantial increase in the remand rate for those same cases. Indeed, the remand rate for diversity removals rose from about 12 percent in 1979 to almost 20 percent in 2003. As Figure 5 demonstrates, the same general pattern

Figure 2: Proportion of federal cases originating as removals by source of federal jurisdiction.



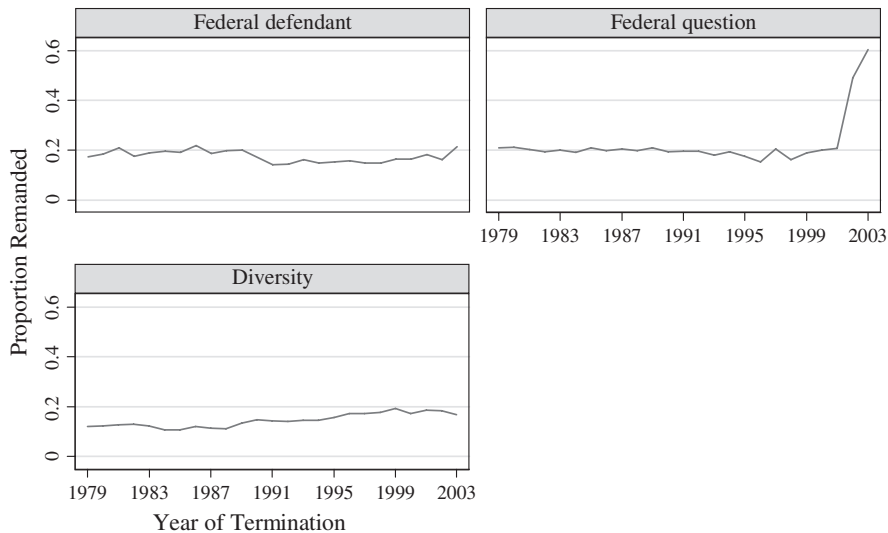
SOURCE: Administrative Office of the U.S. Courts, 1979–2003.

Figure 3: Proportion of diversity cases originating as removals, tort and contract.



SOURCE: Administrative Office of the U.S. Courts, 1979–2003.

Figure 4: Remand rate of cases removed to federal court by source of federal jurisdiction.



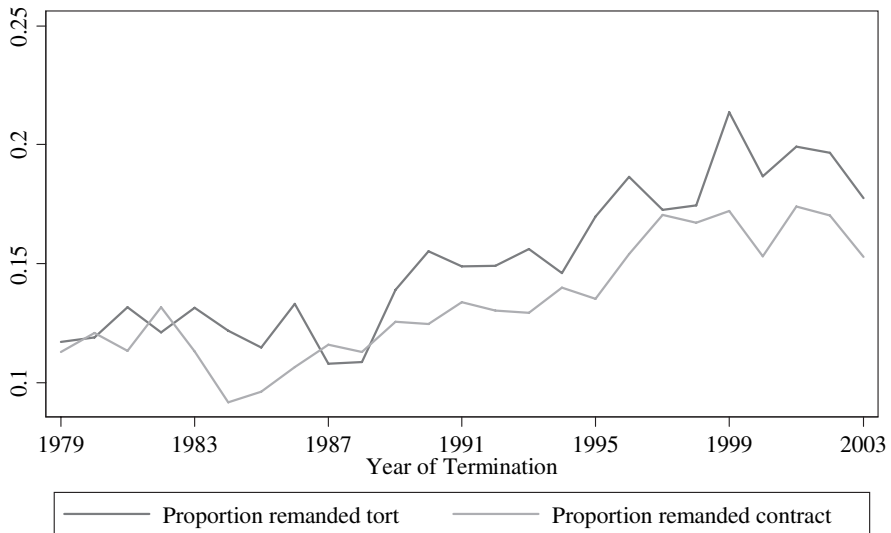
SOURCE: Administrative Office of the U.S. Courts, 1979–2003.

is visible when we divide diversity removals into tort and contract cases. Despite a slight decrease in the remand rates for both categories over the last couple of years, over the longer term the remand rates have increased fairly steadily.

It is also worth noting the remand rate for cases falling under the other two main heads of federal jurisdiction—federal question and federal defendant. As Figure 4 shows, the remand rate for federal question cases increased dramatically in 2002 and 2003, reaching as high as 60 percent. That recent increase, however, is attributable to the remands of more than 20,000 asbestos cases⁴⁶ and does not appear to reflect a lasting trend among federal question cases or across other categories of cases. Excluding that increase,

⁴⁶According to AO termination data, in calendar year 2002 and nine months of calendar year 2003, 21,917 purported federal question asbestos cases were remanded to state courts; 10,484 of those remands (47.8 percent) were from the Northern District of Ohio. Another 3,727 (17.0 percent) were remands from the Eastern District of Virginia. Those same asbestos remands explain the recent sharp increase, shown in Figure 2, in the proportion of all federal question cases originating as removals. That proportion is based on the total number of removed and nonremoved cases terminated each year, whether by remand or otherwise. Thus, the remand of an unusually large number of cases in a particular year will cause an increase in the number of removed cases reported in Figure 2.

Figure 5: Remand rate of removed diversity cases, contract and tort.



SOURCE: Administrative Office of the U.S. Courts, 1979–2003.

we note that by 2001, the remand rate for federal question cases was about 20 percent. The same was true for federal defendant cases.⁴⁷ Taken together with the increase in the remand rate for diversity cases, this means that, by 2001, almost a fifth of all removed cases were remanded.⁴⁸ That would seem to constitute a substantial drag on the federal system.

⁴⁷As Figure 4 shows, the remand rate for federal defendant cases has remained reasonably steady over time, with the exception of a fairly substantial decrease in the late 1980s and early 1990s. That drop may be attributable to the Supreme Court's decision in *Mesa v. California*, 489 U.S. 121 (1989), which restricted the availability of removal in cases against federal officers. We have not attempted to measure *Mesa's* effect in any direct way, but it is conceivable that *Mesa* caused fewer federal officers even to try to remove their cases, which in turn depressed the overall remand rate. This story is consistent with the fact, reflected in Figure 2, that the proportion of federal defendant cases originating as removals began to decrease fairly steadily in about 1990.

⁴⁸Federal defendant, federal question, and diversity removals collectively account for very nearly all removals. In 1999, for example, 30,959 of the 31,018 removed cases that terminated in federal court, or 99.8 percent of the total, fell into one of those three categories. That percentage held in 2000, when 29,776 of 29,826 terminated removals fell into one of the three categories. (The few cases left over in both years were federal plaintiff removals.) Thus, to speak of the overall remand rate for federal defendant, federal question, and diversity cases is, for all intents and purposes, to speak of the remand rate for all removals.

In sum, the AO data reveal that, by the early 2000s, a substantial percentage of removals were erroneous. Over the last two decades, the problem has generally grown for diversity-based removals, and the rate of growth (considered in terms of total number of removals per year) has generally increased as well.

Of course, the AO data themselves do not show precisely *why* erroneous diversity removals have increased over the last two decades. We note, though, that the time trend corresponds roughly with the rise of mass tort litigation and, in particular, with the increase (real or perceived) in punitive damage awards in state tort litigation.⁴⁹ Without regard to the actual extent of the increase in state mass tort judgments, defendants' (and defense counsels') *perception* of a dramatic increase, combined with the widespread belief that exposure tended to be greater in state than federal court, provided an incentive to remove as many cases as possible. In short, and unsurprisingly, the increase in erroneous removal over the last two decades corresponds with a period during which defendants saw more to be gained from removal.

IV. ALABAMA: A CLOSER LOOK

To better understand the phenomenon of erroneous removal, we examine in greater detail the patterns of removal and remand in a single state, Alabama. Our selection is not random. Over the past decade, the Alabama state courts have often been identified as hotbeds of anti-defendant bias and abusive plaintiff-side litigation tactics.⁵⁰ As a result, one might expect defen-

⁴⁹See, e.g., John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 142 (1986) ("In the mid-1970's, unprecedented numbers of punitive awards in products liability and other mass tort situations began to surface. Many of these awards were also unprecedented in amount. And these trends continued and accelerated into the 1980's."); George L. Priest, Punitive Damages and Enterprise Liability, 56 S. Cal. L. Rev. 123, 123 (1982) (noting that a study of civil trials in Cook County, Illinois, showed that punitive damages were awarded in four times as many cases in 1979 as in an average year between 1959 and 1978). But see Theodore Eisenberg, Paula L. Hannaford-Agor, Michael Heise, Neil LaFountain, G. Thomas Munsterman, Brian Ostrom & Martin T. Wells, Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data, J. Empirical Legal Stud. (forthcoming in 2006) (no real increase in punitive damages awards from 1992 to 2001 in approximately 45 large urban counties).

⁵⁰See, e.g., 2005 U.S. Chamber of Commerce State Liability Systems Ranking Study (2005) (reporting that, in a national Harris Poll of in-house general counsel and other senior litigators at public corporations regarding their views on the fairness of each state's "liability system,"

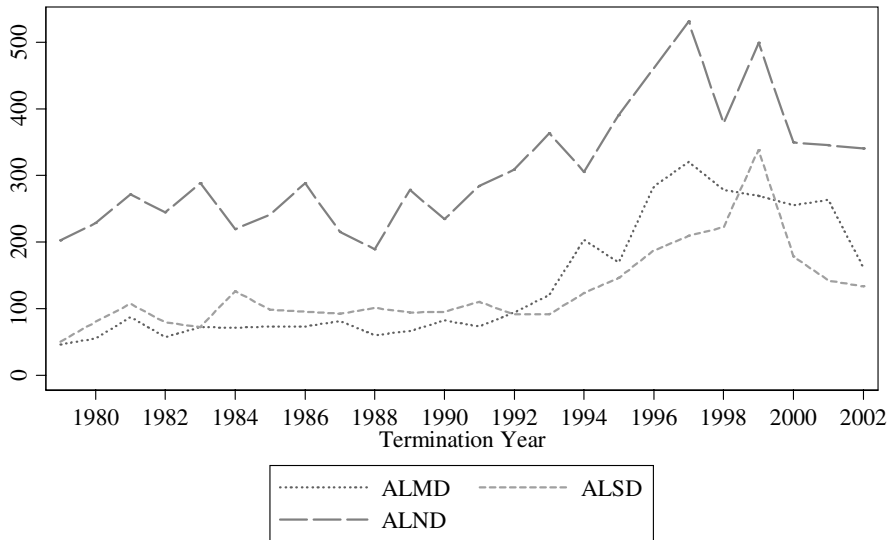
dants sued in Alabama state court to be particularly eager to seek removal, perhaps even to the point of attempting to remove cases not eligible for removal.

We rely on two data sources to assess the presence of erroneous removal in Alabama. First, we use the AO data, focusing here on the three federal districts in Alabama. These data show that erroneous removal is an even greater problem in Alabama than it is nationally. As Figure 6 depicts, the annual volume of diversity removals to Alabama's three federal districts increased from 1979 to 2002, just as it did nationwide. As Figure 7 shows, all three federal districts in Alabama also experienced significant increases in the remand rate for diversity cases, increases substantially exceeding the national increase. Indeed, for a time in the late 1990s, over 60 percent of diversity cases removed to the Middle and Southern Districts of Alabama were remanded. In short, the trends in Alabama from the late 1970s to the early 2000s are generally more extreme versions of the national trends for the same period: the number of diversity removals increased more rapidly, and the remand rate was both higher as an absolute matter and more precipitous in its rise.

Figures 6 and 7 also show, however, that erroneous removal has decreased in all three Alabama federal districts since the late 1990s, though it remains above where it was in the 1980s and early 1990s. The decrease over the last few years corresponds to what appears to be a shift in the defendants'-side literature toward singling out other jurisdictions as the "worst of the worst" in terms of their purported pro-plaintiff bias. That is, while

Alabama ranked 48th out of the 50 states); American Tort Reform Association, *Bringing Justice to Judicial Hellholes* (2002) (singling out several counties in Alabama for "dishonorable mention" as "judicial hellholes"); Rand Institute for Civil Justice, *Punitive Damage Awards in Financial Injury Jury Verdicts* (1997) (reporting the results of a study of punitive damages awarded between 1985 and 1994 in California, New York, Cook County, Illinois, St. Louis, Missouri, and Harris County, Texas, and between 1992 and 1997 in Alabama, and stating that "in Alabama, punitive damages are awarded more often and are higher in any given case relative to compensatory damages than in the other jurisdictions in the database"); Gregory Janes, *Where the Torts Blossom*, *Time*, Mar. 20, 1995, at 38, 38 (noting that Alabama's "Barbour County . . . has become nationally recognized as tort hell"). But see Erik K. Moller, Nicholas M. Pace & Stephen J. Carroll, *Punitive Damages in Financial Injury Jury Verdicts*, 28 *J. Legal Stud.* 283, 333-34 (1999) (Alabama juries award punitive damages in financial injury cases at rates similar to other states, award smaller punitive damages than in other states, but punitive awards constitute a high proportion of amounts awarded and are a high multiple of compensatory damages).

Figure 6: Number of diversity removals, Alabama federal districts.



SOURCE: Administrative Office of the U.S. Courts, 1979–2002.

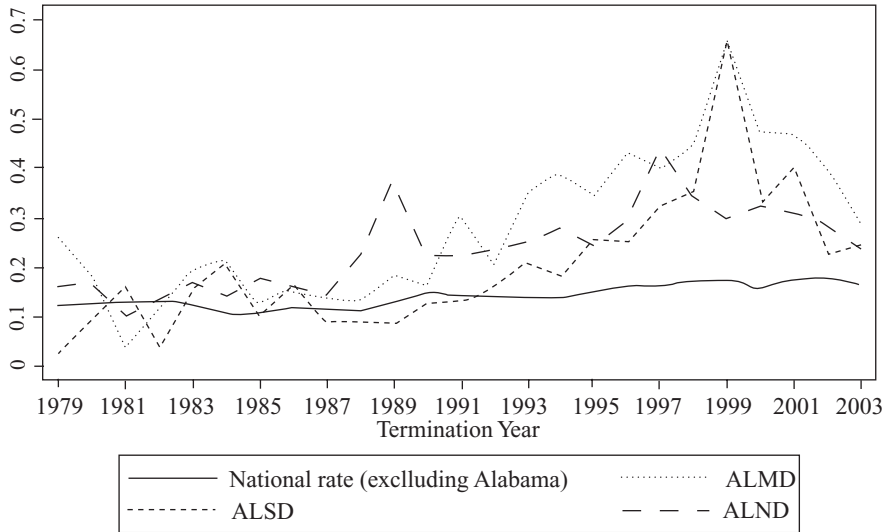
Alabama continues to be viewed negatively by defense counsel,⁵¹ some studies no longer rank Alabama among the very worst purported “judicial hellholes” in the country.⁵² Our data provide no way to confirm this, but if defense counsel no longer view Alabama state courts as negatively as they did several years ago, it is possible that their felt need to remove Alabama cases to federal court might be less than it was previously. If so, that might explain the recent decrease in erroneous removal in Alabama. Even with that decrease, however, Figure 7 confirms that a substantial percentage of all removals in Alabama continue to happen in error.

In addition to drawing on the AO database, we have used the AO’s Public Access to Court Electronic Records (PACER) service to access electronic docket sheets for every case removed to the U.S. District Courts for

⁵¹See 2005 U.S. Chamber of Commerce State Liability Systems Ranking Study, *supra* note 49.

⁵²Compare American Tort Reform Association, *Bringing Justice to Judicial Hellholes* (2002) (singling out several counties in Alabama for “dishonorable mention” as “judicial hellholes”), with American Tort Reform Association, *Judicial Hellholes* (2004), and American Tort Reform Association, *Bringing Justice to Judicial Hellholes* (2003) (omitting reference to any Alabama jurisdiction).

Figure 7: Remand rates of removed diversity cases, Alabama districts versus all other federal districts.



SOURCE: Administrative Office of the U.S. Courts, 1979–2003.

the Northern and Middle Districts of Alabama that terminated in 2001. Inevitably, there is a limit to how much we can infer from a single year's data in two districts. But even within the limited timeframe, the docket sheets allow us to track important information not included in the AO data. Most significantly, the docket sheets reveal whether removal was challenged in a particular case. We can therefore measure plaintiffs' success rates in seeking remand, and can compare that to defendants' success rates in keeping their removed cases in federal court.

Tables 1 and 2 display our findings. Two results stand out. First, many removals are not challenged. As shown in Panel A of Tables 1 and 2, about 48 percent of all diversity removals and 60 percent of all federal question removals were not contested. Second, in cases where removal was actively challenged, the remand rate is very high. That rate is displayed most directly in Panel B of Tables 1 and 2. As the tables suggest, the docket sheets show two forms of remand. The most common method is for the plaintiff to file a remand motion. Alternatively, the district court may examine the propriety of removal on its own initiative. In the latter case, the docket sheets will sometimes record the court as having remanded the case even though no remand motion was filed. We call these "sua sponte remands." Tables 1 and

Table 1: Disposition of Diversity Tort and Contract Cases Removed to the U.S. District Courts for the Northern and Middle Districts of Alabama, Cases Terminating in 2001

<i>A. Cases With & Without Motions to Remand</i>						
	<i>Include Sua Sponte Remands</i>			<i>Exclude Sua Sponte Remands</i>		
	<i>Remand Denied</i>	<i>Remanded</i>	<i>No Motion</i>	<i>Remand Denied</i>	<i>Remanded</i>	<i>No Motion</i>
Tort (N)	18	80	116	18	66	116
Percent	8.4	37.4	54.2	9.0	33.0	58.0
Contract (N)	19	116	102	19	104	102
Percent	8.0	49.0	43.0	8.4	46.2	45.3
Total (N)	37	196	218	37	170	218
Percent	8.2	43.5	48.3	8.7	40.0	51.3

<i>B. Cases with Motions to Remand</i>						
	<i>Include Sua Sponte Remands</i>			<i>Exclude Sua Sponte Remands</i>		
Tort (N)	18	80	—	18	66	—
Percent	18.4	81.6	—	21.4	78.6	—
Contract (N)	19	116	—	19	104	—
Percent	14.1	85.9	—	15.5	84.6	—
Total (N)	37	196	—	37	170	—
Percent	15.9	84.1	—	17.9	82.1	—

NOTE: Sua sponte remands are removed cases that were remanded to state court but in which the docket sheet contains no evidence that a motion to remand was made.

SOURCE: Individual case docket sheets, accessed through the Administrative Office of the U.S. Courts Public Access to Court Electronic Records (PACER) project.

2 display the remand success rate both including and excluding sua sponte remands.⁵³ Either way, the remand success rate is very high. Table 1, Panel B, shows that, excluding sua sponte remands, plaintiffs succeeded in 82.1 percent of the diversity cases whose removals they challenged. Including sua

⁵³It may make sense to include sua sponte remands when calculating plaintiffs' success rate in obtaining remands. First, some remands recorded as sua sponte may actually be plaintiff initiated. Oral remand motions might not always be recorded; instead, the docket sheet may simply record the court's formal order of remand. Second, in cases where the propriety of the removal is first raised by the court sua sponte, the plaintiff may well have raised the issue had the court not done so first. Third, even in cases where the plaintiff was unaware of an argument for remand until the court raised it, the remand itself amounts to a success for the plaintiff insofar as it returns the case to the plaintiff's chosen forum. For all these reasons, including sua sponte remands may yield the most accurate assessment of plaintiffs' true success rates in this area.

Table 2: Disposition of Diversity and Federal Question Cases Removed to the U.S. District Court for the Northern and Middle Districts of Alabama, Cases Terminating in 2001

A. Cases With & Without Motions to Remand

	<i>Include Sua Sponte Remands</i>			<i>Exclude Sua Sponte Remands</i>		
	<i>Remand Denied</i>	<i>Remanded</i>	<i>No Motion</i>	<i>Remand Denied</i>	<i>Remanded</i>	<i>No Motion</i>
Diversity (<i>N</i>)	37	196	218	37	170	218
Percent	8.2	43.5	48.3	8.7	40.0	51.3
Federal question (<i>N</i>)	25	54	119	25	41	119
Percent	12.6	27.3	60.1	13.5	22.2	64.3
Total (<i>N</i>)	62	250	337	62	211	337
Percent	9.6	38.5	51.9	10.2	34.6	55.3

B. Cases with Motions to Remand

	<i>Include Sua Sponte Remands</i>			<i>Exclude Sua Sponte Remands</i>		
	<i>Remand Denied</i>	<i>Remanded</i>	<i>No Motion</i>	<i>Remand Denied</i>	<i>Remanded</i>	<i>No Motion</i>
Diversity (<i>N</i>)	37	196	—	37	170	—
Percent	15.9	84.1	—	17.9	82.1	—
Federal question (<i>N</i>)	25	52	—	25	39	—
Percent	32.5	67.5	—	39.1	60.9	—
Total (<i>N</i>)	62	248	—	62	209	—
Percent	20.0	80.0	—	30.6	69.4	—

NOTE: Sua sponte remands are removed cases that were remanded to state court but in which the docket sheet contains no evidence that a motion to remand was made.

SOURCE: Individual case docket sheets, accessed through the Administrative Office of the U.S. Courts Public Access to Court Electronic Records (PACER) project.

sua sponte remands, Table 1 shows that plaintiffs' success rate for diversity cases was 84.1 percent. The remand success rate is similarly high for the subset of cases consisting of diversity tort cases reported in Panel B's "Tort" rows—78.6 percent excluding sua sponte remands, 81.6 percent including them.

Another way of expressing these results is that plaintiffs' error rate in seeking remand is substantially lower (17.9 percent for diversity cases excluding sua sponte remands; 15.9 percent when including them, as shown in Table 2, Panel B's "Diversity" rows) than defendants' error rate when removing in the first place (43.5 percent for diversity-based removals, as shown in Table 2, Panel A's "Diversity" rows). The disparity is similarly high for the diversity-based tort removal subset of cases. Whereas plaintiffs' remand error rate is 21.4 percent for such cases (18.4 percent if sua sponte remands are included, as shown in Table 1, Panel B's "Tort" rows), defendants' removal

error rate is much higher at 37.4 percent (as shown in Table 1, Panel A's "Tort" rows).⁵⁴

This disparity in error rates may provide a basis for assessing whether the prevalence of erroneous removal is the product of honest uncertainty about the law or abusive litigation practices. Consider the case for the proposition that uncertainty about the law explains removal error. This account stresses that the procedural requirements governing the removal process can raise difficult questions, particularly with respect to the running of the 30-day removal clock. As suggested in Section II, to the extent the law is too complicated to yield accurate predictions about its application, defense counsel may decide that zealous advocacy requires erring on the side of removal. If so, then much erroneous removal could be attributed to factual and doctrinal uncertainty. Yet if this were the case, we might also expect plaintiffs' remand efforts to yield an error rate comparable to the rate of erroneous removal. That is, if uncertainty leads each side to err on the side of overprotecting its interests, then Alabama plaintiffs should file a high rate of unsuccessful remand motions just as Alabama defendants engage in a high rate of erroneous removal. But the data do not reveal such parity. Instead, plaintiffs challenge fewer than half of all removals,⁵⁵ but prevail in over 80 percent of their challenges. This suggests that plaintiffs are quite adept at distinguishing between legitimate and illegitimate removals. Unless we hypothesize an Alabama plaintiffs' bar that is far more legally sophisticated than its defense-side counterpart, it may be fair to surmise that defense counsel can also distinguish between proper and improper removals, but pursue improper removals anyway. That is, the high rate of erroneous removal in Alabama may be best attributed to knowingly wrongful removal, not simply to honest uncertainty about the law.⁵⁶

⁵⁴The pattern of high remand rates in contested removals spans both districts. For example, the 80 percent remand rate in the left columns of Table 2, Panel B, is the combination of an 83 percent remand rate in the Middle District of Alabama and a 77 percent remand rate in the Northern District of Alabama. But the *sua sponte* remand activity is much higher in the Northern District than in the Middle District.

⁵⁵See Table 1, Panel A; Table 2, Panel A.

⁵⁶Of course, the erroneous defense removal rate discussed here is measured with reference only to removed cases. Another potentially relevant measure of defendant error would be to consider cases at the state court level, prior to removal. At that stage, many cases are not removed, either because defendants believe no ground for removal exists or because defendants are content with the state forum. Data limitations and the difficulty of independently analyzing a properly removable case limit the ability to compute an *ex-ante* rate of erroneous removal.

There may, however, be other ways to account for the difference between plaintiffs' and defendants' error rates. In particular, it may be that the 30-day removal period is sometimes too short for defendants to ascertain whether a case is removable. For example, as mentioned in Section II, difficult questions can arise regarding the amount-in-controversy requirement for diversity jurisdiction, especially where the complaint does not expressly quantify the claim for relief. Thirty days may not be enough to resolve such questions. Similarly, the complaint may omit any allegation of the plaintiff's citizenship, and reliably answering that question may also take more than 30 days. In such circumstances, the defendant might elect to remove the case without yet knowing for certain whether the case is removable, on the theory that the open questions will be resolved later and the case remanded if appropriate.⁵⁷ By the time the plaintiff decides whether to seek a remand, however, this uncertainty might not be an issue—either because the plaintiff knew the relevant information all along, or because the additional time has enabled the plaintiff to ascertain facts that the defendant was unable to learn within the initial 30 days. In other words, the information defendants rely on to make removal decisions may be more imperfect than the information later available to plaintiffs when deciding whether to seek remand. If so, then it would not be surprising to find that plaintiffs are more successful with their remands than defendants are with their removals.⁵⁸

In sum, the docket sheet data are consistent with attributing at least some of the rise in erroneous removal in Alabama to knowingly wrongful, abusive removal. But there are other possible explanations as well, and the data do not afford a basis for determining which explanation is best. The AO data do, however, clearly establish that erroneous removal is a growing

⁵⁷This appears to be the recommended practice in California. See California Practice Guide: Federal Civil Procedure Before Trial 2:927.1 ("If defense counsel receives a state court complaint within 30 days after service and the defendant is a nonresident, serious consideration should be given to immediate removal . . . regardless of any uncertainty as to plaintiff's domicile.").

⁵⁸Remand motions are also subject to a 30-day period, though in practice it is probably less onerous. Under 28 U.S.C. § 1447(c), "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal." The exception for lack of subject matter jurisdiction effectively gives plaintiffs as long as they need (as long as final judgment has not yet been entered) on that issue. True, they have only 30 days to ascertain whether the removal was proper on other grounds, including whether the defendant complied with its 30-day limitation period. In most cases, however, that question is probably quite easy to answer.

phenomenon, both nationally and in Alabama. The growth is especially pronounced in diversity cases, where, over the last two decades, the total number of removals has risen, the portion of the federal diversity docket consisting of removals has expanded, and the remand rate has climbed. If these trends continue, the federal courts will be obliged to devote more and more of their scarce resources to state cases that belong in state court.

V. CONCLUSION

Substantial empirical evidence establishes that, especially among state cases removed on diversity grounds, erroneous removal is a significant and growing phenomenon. Erroneous removal increases litigation costs, delays resolution of the merits, and imposes a deadweight loss on the judiciary. To be sure, not all instances of erroneous removal are abusive, and some errors are probably unavoidable. But the increasing incidence of the phenomenon commends consideration of sensible reforms.

One possible reform might be to create a stronger rule in favor of fee shifting when a removed case is remanded. The removal statute provides that the remanding court “may” order the defendant to pay the plaintiff’s attorney fees and costs “incurred as a result of the removal,”⁵⁹ but the lower courts appear divided over what standard to use in implementing this provision.⁶⁰ Congress could amend the statute to make fee shifting mandatory, or at least to create a presumption in favor of fee shifting upon remand. In the absence of legislative reform, the courts could consider adopting such a presumption under the current statute.⁶¹ In any event, the data presented here suggest that erroneous removal is a problem worth addressing.

⁵⁹28 U.S.C. § 1447(c).

⁶⁰Compare *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004) (“Fees should only be awarded if the removing defendant lacked objectively reasonable grounds to believe the removal was legally proper.”) (internal quotation marks omitted), with *Hart v. Wal-Mart Stores, Inc.*, 360 F.3d 674, 678 (7th Cir. 2004) (“If removal is found to be improper, the plaintiff is presumptively entitled to an award of fees.”).

⁶¹The Supreme Court will have an opportunity to do so this Term in *Martin v. Franklin Capital Corp.*, *petition for cert. granted*, 125 S. Ct. 1941 (Apr. 25, 2005) (No. 04–1140).